(2)

No. 85-608

In the Supreme Court of the United States

OCTOBER TERM, 1985

STATE OF ILLINOIS,

Petitioner,

vs.

ALBERT KRULL, GEORGE LUCAS and SALVATORE MUCERINO,

Respondents.

RESPONDENTS' CONSOLIDATED BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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QUESTIONS PRESENTED

A. An Arrest And Search Made Pursuant To A Procedural Statute, Not Yet Declared Unconstitutional And Which Authorizes Unlawful Searches, Will Not Be Upheld Even Though The Arrest And Search Were Made In Good Faith Reliance On The Statute

B. Additional Reasons That Certiorari Should Be Denied:

(1) The decision below gave full consideration to the issues and decided them in conformity with the precedent established by this Court;

(2) The State mischaracterizes the facts and therefore, it is unlikely on this record that the Court could reach the Constitutional issue;

(3) The cases relied upon by the State are distinguishable on the law and facts;

(4) The State fails to address the issue decided by the Illinois Supreme Court;

(5) The State fails to provide any basis upon which this Court should exercise its discretion.

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No. 85-608

IN THE
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NATURE OF THE CASE[1]

On September 25, 1981, the trial court granted Defendants' joint motion to suppress evidence seized pursuant to a warrantless administrative search. The search was conducted on July 5, 1981, on the business premises of Action Iron & Metal, Inc. by police officers ostensibly under the authority of Ill. Rev. Stat., Ch. 95-1/2, Section 5-401(e) (1981).[2] The State appealed the decision to the Illinois Appellate Court.

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[1]All citations designated as "Supp. R." refer to the findings of the Trial Court upon remand. All citations designated as "R." refer to the official Record on Appeal. All citations to those items which were the subject of Defendants' Motion to Supplement the Record filed on January 9,1985 shall be designated as "Dft.M. Supp. R.".

[2]Sections 5-401 et seq. provided for administrative searches for certain purposes of businesses engaged in acquiring, wrecking, recycling, rebuilding and/or selling autmotive parts. Krull R. 11-17, Exhibit B.

Judge Milton I. Shadur of the United States District Court for the Northern District of Illinois had, previous to the trial court's ruling, declared Section 5-401(e) unconstitutional in Cause No. 80 C 3696 on July 6, 1981.[3] The decision of the District Court was appealed to the Seventh Circuit Court of Appeals. During the pendency of the appeal, the Illinois Legislature promulgated Section 5-403 (eff. Jan. 1, 1983) consistent with the mandate of the District Court opinion.

In light of the new enactment, the Seventh Circuit determined on August 23, 1983 that Section 5-403 as enacted was constitutional. The Seventh Circuit

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[3]Defendant Krull and Action Iron & Metal,Inc. filed a Complaint for Injunctive and Declaratory Relief subsequent to the search on July 5, 1981. The case was consolidated by Judge Shadur with 80 C 3696 and Defendant Krull and Action Iron & Metal, Inc. were included as parties in Judge Shadur's order.

specifically declined to review Judge Shadur's decision holding Section 5-401(e) unconstitutional. Judge Shadur's order was affirmed in part and vacated in part on other grounds.

The Illinois Appellate Court was advised of the Seventh Circuit's decision. On November 23, 1983, the Illinois Appellate Court vacated the trial court's order and remanded the case to the trial court to consider certain specific questions on remand. The State did not appeal the decision of the Appellate Court. On remand, the trial court again granted Defendants' motion to suppress. The State appealed directly to the Illinois Supreme Court.[4]

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[4]The Appellate Court had specifically remanded the case with the intention that the matter be returned to tne Appellate Court for further consideration. The Court states:

In the present case, the State

FACTS

Prior to the warrantless entry onto the business premises of Action Iron & Metal, Inc., various auto yards regulated by Section 5-401(e) filed a Complaint on July 21, 1980, in the United States District Court for the Northern District of Illinois to declare Section 5-401(e) unconstitutional. The suit, captioned Bionic Auto Parts, et al. v. Fahner, et al., 80 C 3696, was filed against the Illinois Attorney General, the Chicago Police Department, the Illinois Secretary of State and the State's Attorney of Cook

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argues that the police acted in good faith. This contention might be of significant import in the ultimate resolution of this case. However, we believe that this assertion requires a factual determination by the trial court. The matter should therefore be remanded for that determination in order that we might then evaluate the State's claim. (Emphasis added).

County.

While that case was being decided, Detective Leland McNally, Badge No. 12157, an agent of the Defendant, Chicago Police Department, entered the premises of Action Iron & Metal, Inc. on July 5, 1981, at approximately 10:30 a.m. for the ostensible purpose of performing a records inspection pursuant to Ill. Rev. Stat., Ch. 95-1/2, Section 5-401(e) (1981). (Supp.R. 4). Detective McNally did not have a search warrant or arrest warrant. There was no probable cause for any of the officers to believe a crime was being committed or, in fact, had been committed. (Supp.R. 6).

Based upon the fruits of the search and property seizures described above, Defendants were charged with various motor vehicle violations either involving possession of stolen motor vehicles,

failure to surrender proper certificates of title or failure to obtain a junking certificate as required by statute. (Ill. Rev. Stat., Ch. 95-1/2, Sections 4-103(a)(1), 4-103(a)(4), and 3-116(c) (1981)).

On July 6, 1981, Judge Milton I. Shadur, United States District Court for the Northern District of Illinois, held Section 5-401(e) unconstitutional. Based upon the District Court's decision, Defendant Krull filed a "Motion to Suppress Evidence" in the pending state court criminal proceeding. The motion was adopted by all defendants. A hearing was held on the motion in the above-captioned proceeding on September 25, 1981, and the motion was granted.

The trial court found that the search authorized by Section 5-401(e) was a "two-step" process. (Supp.R. 5).

First, the officer is entitled to examine the records required to be kept by the licensee. Second, the officer may then search the business premises for the limited purpose of verifying that the records are accurate.

However, the trial court determined that Detective McNally exceeded his authority under the statute. Detective McNally conducted a search of the entire business premises that was not limited to a verification of the records. The trial court rejected the State's argument that even if McNally exceeded the scope of the statutory authority, the search was conducted pursuant to Defendants' consent. These findings were reiterated by the trial court on remand. (Supp.R. 6). The Appellate Court did not disturb the trial court's findings on those points.

Moreover, during the proceeding be-

fore Judge Shadur, the State stipulated that Defendant Lucas did not consent to the search and that Lucas only agreed to Detective McNally's entry onto the premises because he believed he had no choice pursuant to Section 5-401(e). A copy of the Stipulation filed with the United States District Court is attached as Appendix A.

On remand from the Appellate Court, the trial court was asked to consider certain specific issues. First, the Court had to determine if the as yet unadopted "good faith" exception to the exclusionary rule, validating as proper an otherwise improper evidentiary seizure, should be applied to this case. Second, the Court had to determine whether the police officials, as a matter of fact, acted in "good faith" in conducting the instant search and seizure if the new

standard was to be applied. Third, the Court had to determine whether Section 5-401(e), under which Detective McNally conducted the search in question, remains unconstitutional.

The trial court addressed the issue of the good faith exception to the exclusionary rule. Specifically, the Appellate Court requested the Judge to consider this issue in view of the Supreme Court's decision in Illinois v. Gates, 462 U.S. 213 (1983). (Supp.R. 9).

The trial court concluded inter alia that the Gates case was distinguishable because the "good faith" exclusion did not apply to a situation where the statute authorizing the administrative search negated the warrant requirement in the first instance. Gates specifically addresses the situation where an unlawful search is conducted pursuant to the is-

suance of a search warrant. (Supp.R. 9-10).

Finally, the trial court found that as a matter of fact Detective McNally's search exceeded the authority granted by Section 5-401(e) in executing the search and that the search was not a consent search. (Supp.R. 5).

ARGUMENT

A.

An Arrest And Search Made Pursuant To A Procedural Statute, Not Yet Declared Unconstitutional And Which Authorizes Unlawful Searches, Will Not Be Upheld Even Though The Arrest And Search Were Made In Good Faith Reliance On The Statute.

Significantly, the State does not address, anywhere in its brief, the precise issues of law and fact actually decided by the Illinois Supreme Court in the opinion below.

The Illinois Supreme Court rejected the State's argument on the following grounds. The Illinois Supreme Court re-

jected the State's attempt to compare the present case to Michigan v. DeFillippo, 443 U.S. 31 (1979) where the Supreme Court of the United States upheld an arrest made pursuant to an ordinance which was subsequently found to be invalid.

The Illinois Supreme Court pointed out that the Supreme Court of the United States continues to utilize the substantive-procedural dichotomy in determining whether a search conducted pursuant to a statute is invalid. The Court concluded that good faith reliance on a statute defined as "procedural" in nature will not cure an otherwise illegal search. The Court states:

> In holding the search constitutional, however, the Supreme Court in DeFillippo distinguished between substantive laws, which define criminal offenses, and procedural laws, which directly authorize searches. An arrest and search conducted pursuant to a substantive law like the

Detroit ordinance will be upheld provided the officer has probable cause to make the arrest and he relied on the statute in good faith. In contrast, an arrest and search made pursuant to a procedural statute, not yet declared unconstitutional, and which authorizes unlawful searches, will not be upheld, even though the arrest and search were made in good-faith reliance on the statute. (443 U.S. 31, 39, 61 L.Ed.2d 343, 351, 99S. Ct. 2627, see, e.g., Torres v. Puerto Rico, (1979), 4424 U.S. 465, 61 L. Ed.2d 1, 99 S. Ct. 2425...The court continues to utilize the substantive-procedural dichotomy in determining whether a search conducted pursuant to a statute was valid. United States v. Leon, (1984), 468 U.S. ____, 82 L.Ed.2d 677, 691, 104 S. Ct. 3405, 3415-16; see e.g., Ybarra v. Illinois (1979), 444 U.S. 85, 62 L. Ed.2d 238, 100 S. Ct. 338.

Section 5-401(e), unlike the Detroit ordinance in DeFillippo, did not define a substantive criminal offense. Rather, it directly authorized warrantless searches. Thus section 5-401(e) is included in the category of statutes which the Supreme Court has defined as procedural. Any good-faith reliance on such a statute will

> not cure an otherwise illegal search. See, e.g., Almeida-Sanchez v. United States, (1973), 413 U.S. 266, 37 L. Ed. 2d 596, 93 S. Ct. 2535; Sibron v. New York, (1968), 392, U.S. 40, 20 L. Ed. 2d 917, 88 S. Ct. 1889; Berger v. New York, (1967), 338 U.S. 41, 18 L. Ed.2d 1040, 87 S. Ct. 1873.

Notably, the Illinois Supreme Court relied on the reasoning of the Leon decision, 468 U.S. ____, 104 S.Ct. 3405, to support its holding. In Leon, this Court reaffirmed its earlier decision in Michigan v. DeFillippo stating:

> We have held, however, that the exclusionary rule requires suppression of evidence obtained in searches carried out pursuant to statutes, not yet declared unconstitutional, purporting to authorize searches and seizures without probable cause or search warrants. (citations omitted). Those decisions involved statutes which by their own terms authorized searches under the circumstances which did not satisfy the traditional warrant and probable-cause requirements of the Fourth Amendment. Michigan v. DeFillippo, 43 U.S. 31, 39 (1979). The substantive Fourth

> Amendment principles announced in those cases are fully consistent with our holding here. Leon, 468 U.S. ____, 104 S.Ct. at 3415, f.n. 8.

Even assuming arguendo that the search was conducted in good faith, this Court's recent decision in the Leon case would not change the result as the State argues. The decision of the Illinois Supreme Court consistently applies an unbroken line of authority reaffirmed by this Court. That authority stands for the proposition that the exclusionary rule applies to exclude evidence where the state statute, not previously declared unconstitutional, purports to authorize searches and seizures without probable cause or search warrants. The Federal District Court, the Illinois trial court, the Illinois Appellate Court and the Illinois Supreme Court agree that the state statute in question purports to

authorize search and seizures without probable cause or search warrants. Indeed, the State is not appealing that determination here. In response to those decisions, the Illinois legislature amended the Statute to comport with the constitutional requirements of the Fourth Amendment.

This Court's own prior decisions are controlling and certiorari should not be granted.

B.

Additional Reasons That Certiorari Should Be Denied:

(1) The decision below gave full consideration to the issues and decided them in conformity with the precedent established by this Court.

The State's argument is merely repetitive of the position that it has taken throughout the appellate history of this case. That argument never changes to account for the distinctions and points raised by the various courts of

review that have considered the State's position.

The decision of the Illinois Supreme Court takes into account this Court's recent decision in Leon, and carefully analyzes the issues raised by the state. The Court's decision as indicated in point A above is in conformity with the established precedent of this Court.

(2) The State mischaracterizes the facts and therefore, it is unlikely on this record that the Court could reach the constitutional issue.

The State maintains in Argument II that the search "took place in good faith" or in the alternative, with the consent of Defendants prior to the District Court's decision declaring the State statute unconstitutional.

First, the State's factual argument is not an accurate recitation of the facts found by the trial court. In fact, the State's factual argument is specific-

ally contradicted by the trial court's finding. The trial court held that the search went beyond the officer's limited authority to verify the accuracy of the records that he was given by Defendants.

Second, the trial court, the Appellate Court and the Supreme Court held that Lucas did not consent to the search. Therefore, even assuming that the officers reasonably relied on the authority granted to them by the statute, the officers failed to conduct the search according to the requirements of the statute. The officers had no probable cause, search warrant, consent or other independent basis to legitimize the search. Therefore, the officers did not act in good faith. People v. Krull, 107 Ill.2d 107, 119-120 (1985).

Indeed, the State stipulated in the Federal District Court proceeding (Appen-

dix A) that the search was not a consent search. Yet the State persists in characterizing the search as a consent search in its Petition.

Therefore, this Court could not, based upon the instant record, reach the constitutional issue raised by the State inasmuch as the police officers did not conduct the search in good faith reliance on the statute.

(3) The cases relied upon by the State are distinguishable on the law and facts.

The Illinois Supreme Court specifically held that the State's attempt to compare this case to the Supreme Court's decision in Michigan v. DeFillippo, was distinguishable.

Additionally, the State specifically relies on the Court's opinion in Almeida-Sanchez v. United States, 413 U.S.266 (1973) and other "good faith" border

search cases such as United States v. Peltier, 422 U.S. 531 (1975). However, the Supreme Court explicitly stated in the DeFillippo opinion that, where the federal statute permitting border searches within a "reasonable distance" of the border was declared unconstitutional, the search was held invalid in Almeida-Sanchez despite the fact that the statute had not been declared unconstitutional at the time of the search.

The cases cited by the State simply do not stand for the proposition of law urged by the State. In fact, the cases explicitly hold that the exclusionary rule applies to exclude evidence where the state statute, not previously declared unconstitutional, directly authorizes an unconstitutional search.

Finally, the cases cited by the State are inapposite. The Supreme Court

of the United States has made a critical distinction between cases involving particular conduct by the police that violates the Fourth Amendment policies and those cases where state law purporting to authorize such conduct violates the Fourth Amendment. Justice Brennan explains this distinction in the case Kolender v. Lawson, 461 U.S. 352, 75 L.Ed.2d 903, 912 (1983):

> We have not in recent years found a state statute invalid directly under the Fourth Amendment, but we have long recognized that the government may not "authorize police conduct which trenches upon Fourth Amendment rights, regardless of the labels which it attaches to such conduct." Sibron v. New York, 392 U.S. 40, 61, 20 L.Ed.2d 917, 88 S. Ct. 1889, 44 Ohio Ops 2d 402 (1968). In Sibron, and in numerous other cases, the Fourth Amendment issue arose in the context of a motion by the defendant in a criminal prosecution to suppress evidence against him obtained as the result of a police search or seizure of his person or property. The ques-

> tion thus has always been whether particular conduct by the police violated the Fourth Amendment, and we have not had to reach the question whether state law purporting to authorize such conduct also offended the Constitution. In this case, however, appellee Edward Lawson has been repeatedly arrested under authority of the California statute, and he has shown that he will likely be subjected to further seizures by the police in the future if the statute remains in force. (Citations Omitted). It goes without saying that the Fourth Amendment safeguards the rights of those who are not prosecuted for crimes as well as the rights of those who are.

The cases cited by the State do not address the situation where state law purports to authorize conduct that offends the Constitution.

The State argues at some length that the purpose of the exclusionary rule would not be served in this case because police officers were acting in good faith. The argument is misplaced. The issue in this case is not focused upon

the conduct of police officers but upon the state law that purports to authorize conduct which offends the Constitution. No amount of good faith conduct can cure that constitutional defect.

In this case, the statute has authorized an inspection scheme as a substitute for the constitutional safeguards afforded every citizen by the Fourth Amendment as a matter of right. The Illinois legislature may not authorize police conduct which trenches upon Fourth Amendment rights, regardless of what labels it attaches to the conduct.

(4) The State fails to address the issue decided by the Illinois Supreme Court.

As noted above, the State does not address the "substantive-procedural dichotomy" issue articulated by the Illinois Supreme Court in deciding the constitutional issue on appeal.

Likewise, the State does not address the Illinois Supreme Court's analysis of the Leon and DeFillippo decisions. Nor does the State raise in its Petition the issue of the court's findings that the search was not conducted in good faith under any circumstances.

(5) The State fails to provide any basis upon which this Court should exercise its discretion.

Rule 17 of the Rules of Practice of the Supreme Court of the United States provides various "considerations" governing review on certiorari. The State does not rest its Petition on any of these considerations. Indeed, the State makes no argument whatsoever regarding the reason that this Court should exercise its judicial discretion. The rule provides that certiorari "will be granted only when there are special and important reasons therefor." Because the

State has not addressed this issue, this Court does not have an articulated basis upon which to exercise its discretion.

CONCLUSION

The Illinois Supreme Court decided that an arrest and search made pursuant to a procedural statute, not yet declared unconstitutional, and which authorizes unlawful searches, will not be upheld even though the arrest and search were made in good faith reliance on the statute. This decision is in conformity with the long line of cases previously decided by this Court.

The State has not addressed the issue decided by the Illinois Supreme Court in its Petition for Writ of Certiorari. Nor has the State established that this Court could reach the constitutional issue based upon the record in the case.

For all of the reasons stated herein, the State's Petition should be denied and certiorari should not be granted.

Respectfully submitted,

One of the Attorneys for the Respondents

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ALBERT G. KRULL and ACTION IRON & METAL, INC., an Illinois Corporation,	)	
Plaintiffs,	)	
vs.	)	No. 81 C 4907
TRYONE FAHNER, ATTORNEY GENERAL OF ILLINOIS, JIM EDGAR, SECRETARY OF STATE OF ILLINOIS, RICHARD M. DALEY, STATES ATTORNEY OF COOK COUNTY, ILLINOIS, RICHARD BRZECZEK, SUPERINTENDENT OF THE POLICE DEPARTMENT OF THE CITY OF CHICAGO, ILLINOIS,	)	
Defendants.	)	

STIPULATION

It is hereby stipulated by and between the Plaintiffs, ACTION IRON & METAL, INC., and ALBERT KRULL, by their respective attorneys, Louis B. Garippo and Miriam F. Miquuelon, and the De-

fendant , RICHARD M. DALEY, State's Attorney of Cook County, Illinois, by his attorney, Elizabeth Cohen, Assistant State's Attorney, that:

1. Plaintiff, ACTION IRON & METAL INC., is a corporation licensed to do business in the State of Illinois and has its principal place of business in the State of Illinois. (A true and correct copy of Plaintiff's license is attached as Exhibit A).

2. Plaintiff, ACTION IRON & METAL, INC., is licensed by the State of Illinois, pursuant to Chapter 95-½, Section 5-301 (Ill. Rev. Stat., 1979) to engage in the business of acquiring, wrecking, recycling, rebuilding and selling automobile parts.

3. Plaintiff, ALBERT G. KRULL, is a duly authroized agent of Plaintiff, ACTION IRON & METAL, INC.

4. The Defendant, Secretary of State, promulgated Rule 5-401(a) pursuant to the enactment of Chapter 95½, Section 5-401(e), Ill. Rev. Stat., 1979.

5. The licensee has been subject to administrative searches pursuant to Chapter 95½, Section 5-401(e) and Rule 5-401(a) on several occasions in or about July, 1981. The searches were conducted without warrant or other legal process and without probable cause. If any form of consent was given by Plaintiffs or their agents permitting entry on to the business premises to conduct the aforementioned searches, such consent was predicated upon Plaintiffs' belief that the statutory authority contained in Chapter 95½, Section 5-401 et seq., declared unconstitutional in Bionic v. Fahner, No. 80 C 3696, authorized Defendants or their agents to conduct the

above-described searches and seizures.

6. Plaintiffs did not receive any prior notification, either written or oral, regarding the Defendants' or their agents' intentions to enter the business premises on the aforementioned dates.

7. On or about July 20, 1981, Plaintiff, KRULL, was arrested by agents of the Defendant, RICHARD BRZECZEK. Plaintiff, KRULL's arrest directly resulted from the seizure of certain vehicular equipment on July 5, 1981, by agents of the Defendant, BRZECZEK during a search conducted pursuant to Chapter 95½, Section 5-401 et seq.

8. Plaintiffs waive their right to demand attorney fees and costs for the preparation and trial of this case at the District Court level only.

9. Plaintiffs are seeking declaratory and injunctive relief only.

Respectfully submitted,

_____
Plaintiff,
Action Iron & Metal, Inc.

_____
Miriam F. Miquelon, Attorney for Plaintiff,
Albert G. Krull

_____
Elizabeth Cohen, Attorney for Defendant,
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Dated: _____